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November 16, 2001

The Honorable John Ashcroft
Attorney General of the United States
U.S. Department of Justice
10th Street and Constitution Avenue, NW
Washington, D.C. 20530

Dear Mr. Attorney General:

I am writing with respect to the proposed settlement of the *U.S. v. Microsoft* case. I believe that the reported settlement agreed to by the Department represents a weakening in our government's commitment to a competitive marketplace and an abandonment of its responsibility to protect consumers.

As you know, earlier this year the D.C. Court of Appeals unanimously affirmed the finding of liability against Microsoft. Simply put, Microsoft was found guilty of violating antitrust law. Any remedy, therefore, must mitigate against its ability to employ predatory practices designed to retain and expand its monopoly power illegally. Otherwise, recidivism looms as a continuing threat to competition, innovation, and to consumer interests.

The proposed settlement has a number of deficiencies, the most egregious of which is its failure to adequately address one of the central issues of contention in the antitrust case: Microsoft's illegal strategy of bundling so-called "middleware" products, such as browsers, instant messaging software, and media players, into its monopoly Windows operating system. No effective mechanism exists in the proposed settlement to resolve disputes on an expedited basis. In addition, there appears to be no meaningful way for the government to secure Microsoft's adherence to the agreement apart from renewed litigation, a process which recent history affirms could take years.

The agreement does establish a technical committee of three experts who will have on-site access to Microsoft records. The fact that one such expert will be chosen by Microsoft, who in turn will have a role in choosing the third and final member of the committee, does not provide much reassurance that this technical committee will be a fully independent "cop on the beat" capable of tracking any corporate transgressions of the joint agreement. Moreover, the agreement does not appear to give these three individuals any power to act to redress any

retaliations by Microsoft against competing software or hardware vendors. Again, government officials seeking to correct a violation would have little recourse except to make a Federal case out of it. That's obviously a poor remedy in the fast paced technology sector.

I am also concerned that the effect of the agreement will be to severely retard the pace of technological innovation. The proposed agreement will largely leave undiminished Microsoft's ability to unfairly leverage its dominance of the desktop into other areas of computing. The company potentially could engage in such conduct in order to suppress emerging competitive threats, such as those posed by Linux-based software platforms, wireless and handheld computers, as well as other, increasingly Internet-enabled, high tech gear. The reported anti-competitive aspects of the Windows XP product, for example, reinforce these concerns.

Finally, the Department's decision to agree to such a weak remedy also appears at odds with the Department's concomitant goal of ensuring the security of American computing assets from terrorist or malicious hacker attack. If the Microsoft monopoly is left intact, and permitted to expand into other areas, America may become all too reliant upon a single operating system or a single dominant browser. Widespread disruption of America's computational infrastructure would be far easier to effectuate in such a scenario because virus and worm attacks could be directed against a single dominant, ubiquitous software system. Such vulnerability could lead to significant economic consequences if a successful attack were to occur. This is as true in the high tech computer sector as it is in the telecommunications marketplace, where reliance upon just a few large providers of telecommunications services would represent fundamentally unwise public policy. The public interest, and national security, would obviously be better served through the active promotion of diverse infrastructures because such diversity and redundancy diminishes the risk that damage to a single system could result in extensive havoc.

A number of Attorneys General from several states have properly concluded that the proposed settlement is woefully inadequate to address the illegal conduct identified by the court. Should the D.C. District Court judge reject the proposed settlement, I strongly urge you to work with these attorneys general to fashion a more pro-competitive and pro-consumer remedy to the court's findings.

Sincerely,

Edward J. Markey

Edward J. Markey
Ranking Democrat
House Subcommittee on Telecommunications
and the Internet